

UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL



COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Thirty-eighth session
Item 9 (c) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF
DETAINEES: STUDY ON THE INDEPENDENCE AND IMPARTIALITY
OF THE JUDICIARY, JURORS AND ASSESSORS AND THE
INDEPENDENCE OF LAWYERS

Final report by the Special Rapporteur, Mr. L.M. Singhvi */

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ANNEX II

DRAFT DECLARATION ON THE INDEPENDENCE OF JUSTICE

The General Assembly,

WHEREAS the peoples of the world have, in the Charter of the United Nations, proclaimed their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, and to promote social progress and better standards of life in larger freedom,

WHEREAS the Charter sets forth, as one of the purposes of the United Nations, the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

WHEREAS the Universal Declaration of Human Rights proclaims in article 2 that everyone is entitled to all the rights and freedoms set forth in that Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or the status of the territory to which he belongs.

WHEREAS the Universal Declaration proclaims in article 10 that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him,

Mindful of the Statute of the International Court of Justice, which postulates and provides for the principle of the independence of judges,

Recalling that the International Covenant on Civil and Political Rights embodies provisions to ensure access to effective remedy to any person whose rights or freedoms are violated and to develop the possibilities of judicial remedy,

Considering that a number of international instruments have proclaimed that all human beings are equal before the law and are entitled to equal protection of the law,

Recalling resolution 3144 (XXVIII) of the General Assembly with reference to draft principles relating to equality in the administration of justice,

Proceeding on the basis of the resolution 5 (XXXII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and in the light of the discussions in and decisions of the Sub-Commission in its successive sessions,

Recognizing that the principle of the impartiality and independence of the judiciary, jurors and assessors and the independence of lawyers is the foundation of the rule of law, equal protection of the law, prevention of discrimination and protection of minorities,

Bearing in mind resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders calling upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges, and Economic and Social Council decision 1984/153 of 25 May 1984, in which the Council invited the interregional

preparatory meeting on the formulation and application of United Nations standards and norms in criminal justice to finalize the draft guidelines on the independence of the judiciary formulated by the Committee on Crime Prevention and Control at its eighth session and invited the Secretary-General to submit the finalized text to the Seventh Congress for adoption.

Noting that, notwithstanding the diversities of political systems and legal mechanisms in different countries, there is a basic and substantial consensus on the principles and minimum standards relating to the independence of justice in the constitutions and legal systems of the world,

Concerned that there exists a gap between the vision underlying the universally accepted principles on the independence of justice and the actual situation in many parts of the world,

Believing that the restatement and elaboration of the principles of the independence of justice and the application of standards based on them will contribute to an improvement in the administration of justice and strengthening of the institutional culture of the rule of law,

Desirous of promoting worldwide solidarity on the principles and standards relating to the independence of justice,

Convinced that an International Declaration on the Independence of Justice will help to advance justice, strengthen freedom and promote rule of law and also to develop legal institutions and enlarge the possibilities of judicial remedies as contemplated in article 2 (3) (b) of the International Covenant on Civil and Political Rights,

Solemnly proclaims this International Declaration on the Independence of Justice,

Calls upon Member States to adhere to the principles and standards contained in this Declaration, to foster its widest possible dissemination particularly among judges, lawyers, jurors and assessors, and to develop programmes for strengthening legal institutions and judicial remedies,

Invites intergovernmental and non-governmental organizations to secure the widest possible dissemination of the principles and standards contained in this Declaration and to pledge their sustained endeavour to ensure their universal observance.

JUDGES

Objectives and Functions

1. The objectives and functions of the judiciary shall include:

- (a) Administering the law impartially irrespective of parties;
- (b) Promoting, within the proper limits of the judicial function, the observance and the attainment of human rights;
- (c) Ensuring that all peoples are able to live securely under the rule of law.

Independence

2. Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgement freely.

4. The judiciary shall be independent of the Executive and Legislature.

5. The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature:

(a) No ad hoc tribunals shall be established to displace jurisdiction properly in the courts.

(b) Everyone shall have the right to be tried expeditiously by the ordinary courts or judicial tribunals under law subject to review by the courts.

(c) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.

(d) In such times of emergency:

(i) Civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts expanded where necessary by appointing additional civilian judges of competence and integrity;

(ii) Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures so as to insure that the detention is lawful as well as to inquire into any allegations of ill-treatment.

(e) The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal.

(f) No power shall be so exercised as to interfere with the judicial process.

(g) The Executive shall not have control over judicial functions.

(h) The Executive shall not have the power to close down or suspend the operation of the courts.

(i) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, association, assembly and movement.

Qualifications, Selection and Training

9. Candidates chosen for judicial office shall be individuals of integrity and ability. They shall have equality of access to judicial office; except in case of lay judges, they should be well-trained in the law.

10. In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

11. The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

(a) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.

(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate effectively.

12. Continuing education shall be available to judges.

Posting, Promotion and Transfer

13. The assignment of a judge to a post within the court to which he is appointed and the assignment of cases to judges or benches of judges are internal functions to be carried out by the judiciary or by a superior council or the judiciary where such bodies exist.

14. Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.

15. Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge.

Tenure

16. The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.

(a) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.

17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.

18. During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(a) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office.

(b) Retirement age shall not be altered for judges in office without their consent.

19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.

20. Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority.

21. Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings.

(a) Judges shall not be required to testify on such matters.

Disqualifications

22. Judges may not serve in an executive or a legislative capacity and may not hold any political or party office unless it is clear that these functions are combined without compromising judicial independence.

23. Judges may not serve as chairmen or members of committees of inquiry except in cases where judicial skills are required.

24. Judges and courts shall not render advisory opinions except under an express constitutional or statutory provision.

25. Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.

26. A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest or incompatibility of functions may arise.

Discipline and Removal

27. A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge:

(a) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary;

(b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a Court or Board referred to in subparagraph (a) above.

28. All disciplinary action shall be based upon established standards of judicial conduct.

29. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

30. With the exception of proceedings before the Legislature, the proceedings for discipline and removal shall be held in camera. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary Tribunal. Judgements in disciplinary proceedings, whether held in camera or in public, may be published.

31. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

32. In the event a court is abolished, judges serving on this court shall not be affected, except for their transfer to another court of the same status.

33. The main responsibility for Court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary.

34. It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.

35. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

36. The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

37. The head of the court may exercise supervisory powers over judges only in administrative matters.

Miscellaneous

38. A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

39. Judges shall accord respect to the members of the Bar.

40. The State shall ensure the due and proper execution of orders and judgements of the Courts; but supervision over the execution of orders and judgements process shall be vested in the judiciary.

41. Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

42. These principles and standards shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless a reference to the context necessarily makes them inapplicable or inappropriate.

JURORS AND ASSESSORS

Selection of Prospective Jurors

43. The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

44. The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction.

45. The jury source list shall be representative and shall be as inclusive of the adult population in the jurisdiction as is feasible.

46. The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.

47. Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.

48. The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum consistent with the needs of justice.

49. All automatic excuses or exemptions from jury service shall be eliminated.

50. Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

Selection of a Particular Jury

51. Examination of prospective jurors shall be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.

52. If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual shall be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative.

53. In jurisdictions where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.

54. Peremptory challenges shall be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

Administration of the Jury System

55. The responsibility for administration of the jury system shall be under the control of the judiciary.

56. The notice summoning a person to jury service shall be in writing, easily understandable, and delivered sufficiently in advance.

57. Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience.

58. Courts shall provide adequate protection for jurors from threat and intimidation.

59. Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.

60. Persons called for jury service shall receive a reasonable allowance.

61. Employers shall be prohibited from penalizing employees who are called for jury service.

Jury Consideration and Deliberations

62. Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.

63. Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.

64. In simple language the trial judge shall:

(a) Directly following empanelment of the jury, give preliminary explanations of the jury's role and of trial procedures;

(b) Prior to commencement of deliberations, direct the jury on the law.

65. A jury's deliberations shall be held in secrecy. Jurors shall not make public reasons for their decisions:

(a) A jury shall be sequestered only for the purpose of insulating its members from improper information or influence.

(b) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

66. An assessor may either perform the functions of a judge or an associate or auxiliary judge or a legal or technical expert. In performing any of these functions the assessors shall discharge their duties and perform their functions impartially and independently. Principles and standards which apply to judges and independent experts are applicable to assessors unless a reference to the context necessarily make them inapplicable or inappropriate.

LAWYERS

Definitions

67. In this chapter:

(a) "Lawyer" means a person qualified and authorized to practice before the courts and to advise and represent his clients in legal matters;

(b) "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

68. The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights.

69. There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

70. All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.

Legal Education and Entry into the Legal Profession

71. Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

72. Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

73. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

74. Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

Education of the Public Concerning the Law

75. It shall be the responsibility of the lawyers to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

Rights and Duties of Lawyers

76. The duties of a lawyer towards his client include:

- (a) Advising the client as to his legal rights and obligations;
- (b) Taking legal action to protect him and his interest; and, where required,
- (c) Representing him before courts, tribunals or administrative authorities.

77. The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

78. Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

79. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

80. No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

81. It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

82. If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

83. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearances before a court, tribunal or other legal or administrative authority.

84. The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

85. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:

(a) Absolute confidentiality of the lawyer-client relationship;

(b) The right to travel and to consult with their clients freely both within their own country and abroad;

(c) The right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;

(d) The right to accept or refuse a client or a brief.

86. Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to:

(a) Take part in public discussion of matters concerning the law and the administration of justice;

(b) Join or form freely local, national and international organizations;

(c) Propose and recommend well considered law reforms in the public interest and inform the public about such matters;

(d) Take full and active part in the political, social and cultural life of their country.

87. Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

Legal Service for the Poor

88. It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

89. Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

90. Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

(a) The direction of such programmes or organizations being entrusted to an independent board composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;

(b) Recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgement.

The Bar Association

91. There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

92. In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar association.

Functions of the Bar Association

93. The functions of a Bar association in ensuring the independence of the legal profession shall be inter alia:

(a) To promote and uphold the cause of justice, without fear or favour;

(b) To maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;

(c) To defend the role of lawyers in society and preserve the independence of the profession;

(d) To protect and defend the dignity and independence of the judiciary;

(e) To promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;

(f) To promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all matters;

(g) To promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation.

(h) To promote a high standard of legal education as a prerequisite for entry into the profession;

(i) To ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;

(j) To promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;

(k) To affiliate with and participate in the activities of international organizations of lawyers.

94. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar association shall co-operate in assisting the foreign lawyer to obtain the necessary right of audience.

95. To enable the Bar association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for:

(a) Any search of his person or property;

(b) Any seizure of documents in his possession;

(c) Any decision to take proceedings affecting or calling into question to integrity of a lawyer.

In such cases, the Bar association shall be entitled to be represented by its president or nominee to follow the proceedings and in particular to ensure that professional secrecy is safeguarded.

Disciplinary Proceedings

96. The Bar association shall freely establish and enforce in accordance with the law a code of professional conduct of lawyers.

97. The Bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar association with a view to its initiating disciplinary proceedings.

98. Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar association.

99. An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

100. Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.
